March 22, 1872

9.

Submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~341~~ 141

THOMAS R. WELCH, ADMINISTRATOR OF CHESTER ASHLEY, DECEASED, AND JOSHUA M. CRAIG, AS ADMINISTRATOR OF SILAS CRAIG, DECEASED, APPELLANTS,

vs.

ELIZABETH J. BARNARD ET AL., HEIRS OF THOMAS BARNARD, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

and

FILED DECEMBER 6, 1870.

March 30 1872

Submitted

for Court

SUPREME COURT OF THE UNITED STATES.

No. 341.

THOMAS R. WELCH, ADMINISTRATOR OF CHESTER ASHLEY, DECEASED, AND JOSHUA M. CRAIG, AS ADMINISTRATOR OF SILAS CRAIG, DECEASED, APPELLANTS,

vs.

ELIZABETH J. BARNARD ET AL., HEIRS OF THOMAS BARNARD, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

INDEX.

	Original.	Print.
Mandate of Supreme Court of the United States	1	1
Order of court	7	2
Suggestion and motion	15	6
Scire facias	20	7
Order of court	26	9
Scire facias	28	10
Order of court	34	12
Petition	44	15
Application of the master in chancery	51	17
Order of court	52	17
Master's report	56	19
Order of confirmation	63	22
Decree	66	22
Appeal	68	23
Bond	69	23
Clerk's certificate	71	24

1 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 12th day of April, anno Domini one thousand eight hundred and fifty-eight, at the United States court-room, in the city of Little Rock, Arkansas, the Honorable Daniel Ringo, district judge, presiding and holding said court, the following proceedings were had, to wit: on the chancery side of said court.

And on April 28th, A. D. 1858, it being yet a day of the April term aforesaid, the following proceedings were had, to wit:

THE UNITED STATES OF AMERICA, *ss:*

[L. S.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Whereas, lately in the circuit court of the United States for the eastern district of Arkansas, before you or some of you in a cause between Elizabeth J. Barnard, Mary A. Barnard, Corrine Barnard, William S. Barnard, and Thomas Barnard, infant children and sole
2 heirs of Thomas Barnard, deceased, by William Cannon, their guardian and next friend, and Mary W. W. Ashley, executrix and legatee of Chester Ashley, deceased; and William E. Ashley and Francis A. Ashley and Henry C. Ashley, an infant, by Mary W. W. Ashley, his guardian, heirs of said Chester Ashley, deceased; and Silas Craig, on bill and cross-bills in chancery, the decree of the said circuit court was in the following words, viz:

It is therefore, in consideration thereof, ordered, adjudged, and decreed by the court here, that the claim of the complainants in said original bill in and to the following-described lands, namely, the southwest fractional quarter of section twenty seven, the southeast fractional quarter of section twenty-eight, the northeast quarter of section twenty-seven, all in township eighteen south, of range one west, and the southwest fractional quarter of section fifteen, in township nineteen south, of range one west, described in the pleadings herein, is overruled and inequitable, and that the relief sought in respect thereof, in and by said original bill be denied; that the right and title of the said Silas Craig, and the said executrix and heirs of said Chester
3 Ashley, in and to said lands and appurtenances, be granted as against all such adverse claim, and that said complainants in said original bill do surrender and yield up to said Craig, and the executrix and heirs of said Ashley, all of said lands and appurtenances, or such part thereof as may be in their possession, and that a writ of possession do issue therefor; and that said complainants in said original bill do pay to said Craig, and said executrix and heirs of Chester Ashley, the value of the rents and profits of said land and premises, or of so much thereof as shall have been possessed, used, and enjoyed by said Thomas Barnard, or his heirs, at any time since the conveyance thereof by the gove'nor of said territory to said Craig and Ashley, or to said Craig, for their joint benefit, and not by them sold and conveyed to other persons, and in such case only, until the time of such sale and conveyance; and that Luke E. Barber, the commissioner and master in chancery of this court, at such time and place as he may appoint, and upon reasonable notice to the parties interested therein, do in-

4 quire of witnesses and take and state an account of such rents and profits from year to year, and with interest on the amount due at each annual rent of such, and so much of said land and premises so used and cultivated by said Barnard and his said heirs, after the conveyance thereof from said gove'nor, until the taking of such account, and to ascertain what of said lands and premises have been since sold and conveyed by said Craig and Ashley to other persons, and to exclude from such account the value of the rents and profits of any such lands from the time they may have been so sold and conveyed, and make his report to this court in respect thereof; and upon the coming *in* and confirmation of such report, the said Craig and executrix and heirs of said Ashley do have execution against the complainants in said original bill for the amount so ascertained to be due.

And it is further ordered, adjudged, and decreed that the relief sought by the complainants in said original in respect of the south-east quarter of section twenty-two, in township eighteen south, of range one west, described in the pleadings herein, be denied, and

5 the junior patent, issued to said Thomas Barnard for said tract, be annulled and set aside, and that the right and title of the said executrix and the heirs of Chester Ashley in and to the same be quieted against any adverse claim of the complainants in said orignal bill thereto; and that they surrender and yield up the possession to said executrix and heirs of said Ashley, and that a writ of possession do issue therefor; and that they pay to the said executrix and heirs of said Ashley the value of the rents and profits of the same, or so much thereof as may have been used and cultivated by said Thomas Barnard or his said heirs, from the time said Ashley acquired title thereto under the senior patent issued to William Nooner, until the same may appear to have been sold and conveyed by said Ashley to any other person; and that an account thereof be taken and stated by said commissioner under directions in all respects similar to those given concerning the lands jointly owned by said Craig and Ashley, and upon return and confirmation of such report the said executrix and heirs of said

6 Ashley do have execution against the complainants in said original bill for the amount so ascertained to be due.

And it is further ordered, adjudged, and decreed that the complainants in said original bill do pay the costs of this suit, growing out of said original bill and said cross-bills, and that this cause be continued only for the reports of said commissioner, as by the inspection of the transcript of the record of the said circuit court, which was brought into the Supreme Court of the United States by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, the death of Silas Craig, one of the appellees in this cause, having been suggested; and the appearance of Leland P. Craig and Junius W. Craig, heirs of said Silas Craig, deceased, having been entered, it was ordered by the court that they be made co-appellees in this case, with liberty to resist said appeal.

And whereas, in the present term of December, in the year of

7 our Lord one thousand eight hundred and fifty-five, the said cause came on to be heard before the said Supreme Court, on the said transcript of the record, and was argued by counsel; on consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs, and that the said defendants, heirs

of Chester Ashley, deceased, and others, recover against the said complainants, Elizabeth J. Barnard and others, one hundred and seventy dollars and fifty-eight cents, for their costs herein expended, and have execution therefor.

And it is further ordered, adjudged and decreed by this court that this cause be, and the same is hereby, remanded to said circuit court for further proceedings to be had therein as regards the profits and improvements.

JAN. 8TH.

You therefore are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

8 Witness the Honorable Roger B. Taney, Chief Justice of said Supreme Court, the first Monday of December, in the year of our Lord one thousand eight hundred and fifty-five.

Costs of defendants taxed by W'm Thos. Carroll, clerk of the Supreme Court of the United States: Clerk, $150 58; attorney, $20 00—$170 58.

Filed 1st February, 1858.

W'M FIELD, *Clerk*,
By R. SEARCY, *D. C.*

And by consent and agreement of parties, it is by the court ordered, adjudged, and decreed that this cause be reinstated on the docket of this court and progress to final hearing and determination, and to that end the same be referred to Richard Searcy, the deputy clerk of this court to take and state an account of the rents, profits, and improvements of the different lands in controversy herein, according to the decree entered in this cause heretofore, and that he have force to issue subpœnas for witnesses to testify before him, of the same, and at some time and place to be selected by him, after giving due notice thereof to said parties, or their solicitors of record, and after hearing

9 such testimony and striking a balance, he report his acts and doings in the premises to the next term of this court, until which time this cause is continued.

10 UNITED STATES OF AMERICA,
Eastern District of Arkansas.

Be it remembered that, at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 11th day of April, anno Domini one thousand eight hundred and fifty-nine, at the United States court-room in the city of Little Rock, Arkansas, the Honorable Peter V. Daniel, associate justice of the Supreme Court of the United States, assigned to this circuit, presiding, & Hon. Daniel Ringo, district judge, holding said court, the following proceedings were had, to wit:

And on May 3d, A. D. 1859, it being yet a day of the April term aforesaid, the following proceedings were had, to wit:

ELIZABETH J. BARNARD, MARY A. BARNARD, Corrine Barnard, William S. Barnard, and Thomas Barnard, infant children and sole heirs of Thomas Barnard, deceased, by William Cannon, their guardian and next friend, complainants,

vs.

MARY W. W. ASHLEY, AS EXECUTRIX OF THE last will and testament of Chester Ashley, deceased; and William E. Ashley, Henry C. Ashley, and Mary Francis Freeman, infant, by her guardian Mary W. W. Ashley, heirs of Chester Ashley, deceased; and Silas Craig, defendants.

On original and cross-bills.

11 On this day came the said parties, the complainants, by their solicitor, Albert Pike, and the defendants by their solicitors, Watkins and Gallagher, and Garland & Randolph, and it is suggested and shown to the court here that, since the rendition of the decree in this case, the said defendant Silas Craig has departed this life, and also that his sole surviving heir-at-law, Junius W. Craig, has also departed this life, having previously made and published his last will and testament, not admitted to be such except for the purposes of this suit and to supply necessary parties to the record, whereby he appointed William P. Halliday executor of said will. Whereupon, by consent of parties, it is ordered and directed by the court here that the said William P. Halliday, as such executor, be substituted as one of the parties complainant as well as defendant herein, and that this cause progress accordingly; and that Richard Searcy be, and he is hereby, appointed a special master herein to take and state the account required by the decree herein rendered and in accordance with the terms of said decree, upon reasonable notice to said parties or their respective solicitors, upon the proofs on file, and such further testimony as shall be adduced before him, and make report thereof to this court at the next term thereof. And on motion of said defendants it is further ordered
12 that they have leave to publish certain depositions on file relating to said account. Ordered that this cause be continued until the next term of this court.

And on October 26th, A. D. 1859, it being yet a day of the April term aforesaid, the following further proceedings were had, to wit:

ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, dec'd, by William Cannon, their next friend, complainants,

vs.

MARY W. W. ASHLEY, WIDOW, EXECUTRIX and legatee of Chester Ashley, dec'd; William E. Ashley, Frances A. Ashley, and Henry C. Ashley, heirs of said Chester Ashley, dec'd; and William P. Halliday, executor of the last will and testament of Junius W. Craig, dec'd, surviving heir of Silas Craig, deceased, defendants;

On original bill.

AND

MARY W. W. ASHLEY, WIDOW, EXECUTOR and legatee of Chester Ashley, dec'd; William E. Ashley, Frances A. Ashley, and Henry C. Ashley, heirs of Chester Ashley, dec'd; and William P. Halliday, executor of James W. Craig, sole surviving heir of Silas Craig, deceased, complainants,

13 ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, dec'd, defendants; } On cross-bill.

AND

MARY W. W. ASHLEY, WIDOW, EXECUTOR AND legatee of Chester Ashley, dec'd; William E. Ashley, Frances A. Ashley, and Henry C. Ashley, heirs of Chester Ashley, dec'd, complainants,

vs.

ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, defendants. } On cross-bill.

This day came Richard Searcy, esq., appointed during the present term of this court special master to take and state an account between the parties to this suit, as directed by a decree of this court, and files his report herein.

And on November 5th, A. D. 1866, before the clerk at rules, the following further proceedings were had, to wit:

ELIZABETH J. BERNARD ET ALS., COMPLAINANTS,

vs.

MARY W. W. ASHLEY, EXECUTRIX OF CHESTER Ashley, deceased, et als., defendants; } On original bill.

14 AND

MARY W. W. ASHLEY, EXECUTRIX OF CHESTER Ashley, dec'd; Silas Craig et als., complainants,

vs.

ELIZABETH J. BERNARD ET ALS., DEFENDANTS; } On cross-bill.

AND

MARY W. W. ASHLEY, EXECUTRIX OF CHESTER Ashley, dec'd, et als., complainants,

vs.

ELIZABETH J. BERNARD ET ALS., DEFENDANTS. } On cross-bill.

And now on this day came Thomas R. Welch, as administrator, with

the will annexed, of Chester Ashley, deceased, and Joshua M. Craig, as administrator of Silas Craig, deceased, by solicitor, and filed their suggestion and motion herein.

On consideration whereof, it is ordered that a writ of scire facias issue, directed to the marshal of this district, returnable to rule day, on the first Monday in December next, commanding him to summon the complainants in said original bill, and defendants in said cross-bills, to be and appear in person or by solicitor before the court on that day, and show cause, if any there may be, why the decree of the
15 court here rendered in this cause on the 30th day of April, A. D. 1853, should not be revived, and the lien thereof continued, and the accounts as directed in and by said decree to be taken and stated, proceeded with, in the names and in favor of said administrators, jointly and respectively, in accordance with the terms of said decree, to the end that they may have execution of and for such amounts as may be so ascertained and decreed to be paid by said complainants, in original bill, and defendants, in said cross-bills, and for costs of suit, &c.

Which suggestion and motion is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas, to rule day, on the 1st Monday in November, A. D. 1866, on the chancery side of said court.

BERNARD HEIRS
v.
EX'R'X & HEIRS OF CHESTER ASHLEY, DEC'D; and Silas Craig. } In chancery.

16 And now come Thomas R. Welch, as administrator, with the will annexed, of all and singular the goods, chattels, credits, and effects which were of the said Chester Ashley, deceased, at the time of his death unadministered by Mary W. W. Ashley, executrix of his last will and testament in her lifetime, now deceased; and Joshua M. Craig, as administrator of all and singular the goods, chattels, credits, and effects which were of the said Silas Craig, deceased, at the time of his death, by their solicitor, and suggest and show unto the hon. court here—

That, on the 30th day of April, A. D. 1853, a decree in the above-entitled cause was rendered in and by this hon. court, in chancery sitting, vesting and affirming title in and to certain lands therein described, in part to and in the said executrix and heirs of said Chester Ashley, deceased, and Silas Craig, and in part to the said executrix and heirs of Chester Ashley, deceased, and directing accounts to be taken of the rents of said lands while used and enjoyed by the complainants in original bill, and decreeing also, that said complainants in original bill do pay the entire costs of that suit; from which decree the
17 said heirs of Bernard sued out and prosecuted their appeal to the Supreme Court of the United States, where at the December term thereof, A. D. 1855, the same was in all things affirmed, with costs, and a mandate of such affirmance sent down to this hon. court, all of which will more fully and at large appear by the record and proceedings had in said cause remaining before the court here.

That upon the affirmance of said decree in the Supreme Court of the United States, and return of the mandate consequent thereon, the said heirs of Bernard yielded and gave up to said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and to said executrix and

heirs of Chester Ashley, deceased, the possession of the lands so decreed to them respectively; but said last-mentioned parties, defendants, in original bill, and complainants, in said cross-bills, respectively, have not had or obtained any execution or satisfaction of said decree, either as to said accounts of rents and profits so ordered to be taken, or as to the said costs of suit or the costs accruing on said appeal to the Supreme Court of the United States.

18 That since the affirmance of said decree, the said Silas Craig has departed this life, and various changes and amplications have ensued among those who were or might become his heirs-at-law or otherwise entitled to share his estate; and changes have likewise occurred among said heirs of Chester Ashley, deceased, and which would render it difficult, if not impracticable, to have said decree revived by or in the names of all of said heirs as parties on the record. But upon the death of the said Mary W. W. Ashley, which occurred in May, A. D. 1865, who was executrix of the will of said Chester Ashley, and devisee of his estate in trust for his said heirs, the said Thomas R. Welch was, on the 29th day of June, A. D. 1865, by the probate court of the county of Pulaski, in said State of Arkansas, duly appointed administrator, with the will annexed, of all and singular the estate of said Chester Ashley, unadministered by the said executrix at the time of her death, and he is now acting as such administrator, an exemplification of the letters granted to him as aforesaid being now to the court here shown. And after the death of the said Silas Craig, admin-

19 istrator of all and singular his estate, was duly and in due form by the court of probate in and for the county of Chicot, in said State, granted to the said Joshua M. Craig, who is now acting as such administrator, an exemplification of the letters so issued to him being also to the court here shown.

That the fruits of said decree remaining unsatisfied, consist of moneyed demands properly and peculiarly belonging to said administrators respectively, and which it is their province to collect and receive, not involving the title to land or any matter wherein the said heirs of Ashley and Craig, respectively, have any direct interest or concern.

Wherefore and to the end that said decree may be revived and the lien thereof continued, and said accounts proceeded in, and that they may have execution thereof according to the form, force, and effect of said decree in favor of and in the names of the said administrators of the said Ashley and Craig respectively, they ask for an order that a writ of scire facias issue, directed, &c., commanding, &c., return-

20 able, &c., as may be provided by law and the rules of this hon. court in such case.

J. M. TEBBETTS, *Sol.*

Filed at rules before the clerk Nov. 5th, 1866, and sci. fa. issued.
CHAR'S P. REDMOND, *Clerk.*

Which scire facias is in the words and figures following, to wit:

The President of the United States of America to the marshal of the eastern district of Arkansas, greeting:

Whereas, on the thirtieth day of April, A. D. 1853, a decree was rendered by the United States circuit court for the eastern district of Arkansas, in chancery sitting, vesting and affirming title in and to certain lands therein described, in part to and in Mary W. W. Ashley, widow and executrix and legatee of Chester Ashley, deceased, William E. Ash-

ley, Francis A. Ashley, and Henry C. Ashley, heirs of said Chester
21 Ashley, deceased; and Silas Craig, and in part to and in Mary W. W. Ashley, widow, executrix, and legatee of Chester Ashley, deceased, and William E. Ashley, Francis A. Ashley, Henry C. Ashley, heirs of Chester Ashley, deceased, and directing accounts to be taken of the rents of said lands while used and enjoyed by Thomas Bernard, deceased, in his lifetime, and Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, complainants in the original bill in this suit; and decreeing also that said Bernard's heirs do pay the entire costs of that suit. From which decree the said heirs of Bernard sued out and prosecuted their appeal to the Supreme Court of the United States, where, at the December term thereof, A. D. 1855, the same was in all things affirmed with costs, and a mandate of such affirmance sent down to this hon. court, all of which will more fully and at large appear by reference to the record and proceedings had in said cause remaining before the court here.

That, upon the affirmance of said decree in the Supreme Court
22 of the United States, and return of the mandate consequent thereon, the said heirs of Bernard yielded and gave up to said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and to said executrix and heirs of Chester Ashley, deceased, the possession of the lands so decreed to them respectively, the said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and the executrix and heirs of Chester Ashley, deceased, have not had or obtained any execution or satisfaction of said decree, either as to said account of rents and profits so ordered to be taken, or as to the said costs of suit, or the costs accruing on said appeal to the Supreme Court of the United States.

That, since the affirmance of said decree, the said Silas Craig has departed this life, and various changes and complications have ensued among those who were or might become his heirs-at-law, or otherwise entitled to share his estate; and changes have likewise occurred among said heirs of Chester Ashley, deceased, and which would render it difficult, if not impracticable, to have said decree revived by or in the
23 names of all said heirs or parties on the record. But upon the death of the said Mary W. W. Ashley, which occurred in May, A. D. 1865, who was executrix of the will of said Chester Ashley, and devisee of his estate in trust for his said heirs, one Thomas R. Welch was, on the 29th day of June, A. D. 1865, by the probate court of the county of Pulaski and State of Arkansas, duly appointed administrator, with the will annexed, of all and singular the estate of said Chester Ashley, unadministered by the said executrix at the time of her death, and he is now acting as such administrator. And after the death of the said Silas Craig, administration of all and singular his estate was duly and in due form by the court of probate in and for the county of Chicot, in said State, granted to one Joshua M. Craig, who is now acting as such administrator. That the fruits of said decree remaining unsatisfied consist of moneyed demands properly and peculiarly belonging to said administrators respectively, and which it is their province to collect
24 and receive, not involving the title to land, or any matter wherein the said heirs of Ashley and Craig respectively have any direct interest or concern: Wherefore, and to the end that said decree may be revived, and the lien thereof continued, and said accounts proceeded in, and that they may have execution thereof, according to the force, form, and effect of said decree, in favor of and in the names of the said administrators of the said Ashley and Craig respectively—

Therefore you are hereby commanded that, by good and lawful men

of your bail'wick, you give notice to the said Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, and to William Cannon, their next friend, that they be and appear before our said court in chancery sitting, at Little Rock, Arkansas, on the first Monday in December, A. D. 1866, to show if they have or can say anything for themselves why the said administrators ought not to have the said decree revived, and the lien thereof continued, and have execution thereof for the part remaining unsatis-
25 fied, according to the form, force, and effect of said decree, if they, the said Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs Thomas Bernard, deceased, and William Cannon, their next friend, shall think fit, and further to do and receive what the said court shall then and there consider concerning them in this behalf; and have you then and there the names of those by whom you shall have given them notice, and this writ.

In testimony whereof Hon. Solomon P. Chase, Chief Justice of the Supreme Court of the United States, hath caused the seal of our circuit court for said district to be hereunto affixed this 5th day of November, A. D. 1866, and of our independence the ninety-first year.

Attest: [L. S.] CHA'S P. REDMOND, *Clerk.*

On which the marshal returns as follows, to wit:

This writ returned non est inventus. The within-named defendants, Elizabeth, Mary, Corrine, and Thomas Bernard not within my bail'wick.

Little Rock, Ark's, Nov. 23d, 1866.

ISAAC C. MILLS,
U. S. M. East'n Dist. of Ark's.

Fee, $8 00.

26 Returned and filed Nov. 23d, 1866.

CHA'S P. REDMOND, *Clerk.*

And on March 4th, 1867, before the clerk at rules, the following further proceedings were had, to wit:

BERNARD HEIRS
versus
EXECUTRIX AND HEIRS OF CHESTER ASHLEY, and Silas Craig. } Bill & cross-bill.

On this day come Thomas R. Welch, as administrator with the will annexed of Chester Ashley, deceased, and Joshua M. Craig as administrator of said Silas Craig, deceased, by their solicitor, and, on their motion and it appearing to the court that, on the 30th day of April, A. D. 1853, a decree in the above-entitled cause was rendered in and by this court in chancery sitting, vesting and affirming title in and to certain lands therein described, in part to and in the said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and in part to the said executrix and heirs of Chester Ashley, deceased, and direct-
27 ing certain accounts to be taken of the rents of said lands while used and enjoyed by the complainants in original bill, and decreeing also that said complainants in original bill do pay the entire costs of said suit.

And it also appearing that said decree remains unexecuted as to the taking of said accounts, and unsatisfied as to said costs, as well as those

accrueing on the affirmance thereof in and by the Supreme Court of the United States;

And it also appearing that said defendants to said cross-bill cannot be found:

It is therefore ordered by the court here that all persons interested in the cause and matters aforesaid be, and they are hereby, required to appear before this court on or before the second day of the next term thereof, at a court to be holden at the court-house in the city of Little Rock on the second Monday in April, A. D. 1867, and show cause, if any they can, why said decree should not be revived, and the
28 lien thereof renewed and continued, and further proceedings had in said cause.

Attest: CHA'S P. REDMOND, *Clerk.*

Which scire facias is in the words and figures following, to wit:

The President of the United States of America to the marshal of the eastern district of Arkansas, greeting:

Whereas on the thirtieth day of April, A. D. 1853, a decree was rendered by the United States circuit court for the eastern district of Arkansas, in chancery sitting, vesting and affirming title in and to certain lands therein described, in part to and in Mary W. W. Ashley, widow and executrix and legatee of Chester Ashley, deceased, William E. Ashley, Francis A. Ashley, and Henry C. Ashley, heirs of said Chester Ashley, deceased, and Silas Craig, and in part to and in Mary W. W. Ashley, widow, executrix, and legatee of Chester Ashley, deceased, and William E. Ashley, Frances A. Ashley, and Henry C. Ashley, heirs of Chester Ashley, deceased, and directing accounts to be taken of the rents of said lands while
29 used and enjoyed by Thomas Bernard, deceased, in his lifetime, and Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, complainants in the original bill in this suit, and decreeing also that said Bernard's heirs do pay the entire costs of that suit, from which decree the said heirs of Bernard sued out and prosecuted their appeal to the Supreme Court of the United States, where, at the December term thereof, A. D. 1855, the same was in all things affirmed, with costs, and a mandate of such affirmance sent down to this hon. court; all of which will more fully and at large appear by reference to the record and proceedings had in said cause remaining before the court here.

That upon the affirmance of said decree in the Supreme Court of the United States, and return of the mandate consequent thereon, the said heirs of Bernard yielded and gave up to said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and to said executrix and heirs of Chester Ashley, deceased, the possession of the lands so
30 decreed to them respectively. The said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and the executrix and heirs of Chester Ashley, deceased, have not had or obtained any execution or satisfaction of said decree, either as to said account of rents and profits so ordered to be taken, or as to the said costs of suit, or the costs accrueing on said appeal to the Supreme Count of the United States.

That since the affirmance of said decree the said Silas Craig has departed this life, and various changes and complications have ensued among those who were or might become his heirs-at-law, or otherwise entitled to share his estate; and changes have likewise occurred among said heirs of Chester Ashley, deceased, and which would render it difficult, if not impracticable, to have said decree revived by or in the

names of all of said heirs or parties on the record; but upon the death of said Mary W. W. Ashley, which occurred in May, A. D. 1865, who was executrix of the will of Chester Ashley, and devisee of his estate in trust for his said heirs, one Thomas R. Welch was, on the 29th
31 day of June, A. D. 1865, by the probate court of the county of Pulaski, and State of Arkansas, duly appointed administrator, with the will annexed, of all and singular the estate of said Chester Ashley, unadministered by the said executrix at the time of her death, and he is now acting as such administrator. And after the death of the said Silas Craig administration of all and singular his estate was duly and in due form, by the court of probate in and for the county of Chicot, in said State, granted to one Joshua M. Craig, who is now acting as such administrator. That the fruits of said decree remaining unsatisfied consist of moneyed demands properly and peculiarly belonging to said administrators, respectively, and which it is their province to collect and receive, not involving the title to land, or any matter wherein the said heirs of Ashley and Craig, respectively, have any direct interest or concern. Wherefore, and to the end that said decree may be revived and the lien thereof continued and said accounts proceeded in, and that they may have execution thereof according to the force,
32 form, and effect of said decree in favor of and in the names of the said administrators of the said Ashley and Craig, respectively:

Therefore you are hereby commanded, as at another time we have commanded you, that, by good and lawful men of your bail'wick, you give notice to the said Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, and to William Cannon, their next friend, that they be and appear before our said court in chancery, sitting at Little Rock, Arkansas, on the first day of our next April term, A. D. 1867, it being the 8th day of April, A. D. 1867, to show, if they have or can say anything for themselves, why the said administrators ought not to have the said decree revived, and the lien thereof continued, and have execution thereof for the part remaining unsatisfied, according to the form, force, and effect of said decree, if they, the said Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, deceased, and William Cannon, their next friend, shall think fit; and further to do and receive what the said court shall then and there consider
33 concerning them in this behalf. And have you then and there the names of those by whom you shall have given them notice and this writ.

In testimony whereof Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, hath caused the seal of our circuit court for the eastern district of Arkansas to be hereunto affixed this 4th day of March, A. D. 1867, and of our independence the ninety-first year.

[L. S.] Attest. CHA'S P. REDMOND, *Clerk.*

On which the marshal returns as follows, to wit:

I hereby certify that, after diligent enquiry, I have been unable to find the within-named parties, or any or either of them, in my bail'wick.

Little Rock, Ark., April 8th, 1867.

ISAAC C. MILLS,
U. S. Marshal Es. Dist. Ark's.

Returned and filed April 5th, 1867.

CHA'S P. REDMOND, *Clerk.*

34 Which marshal's return of notice for revivor is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas, at rule day, on the first Monday in March, A. D. 1867, on the chancery side of said court.

BERNARD'S HEIRS } v. ASHLEY & CRAIG. } On bill & cross-bills.

On this day come Thomas R. Welch, as administrator, with the will annexed, of Chester Ashley, deceased, and Joshua M. Craig as administrator of Silas Craig deceased, by their solicitors, and on their motion, and it appearing to the court that, on the 30th day of April, A. D. 1853, a decree in the above-entitled cause was rendered in and by this court in chancery sitting, vesting and affirming title in and to certain
35 lands therein described, in part to and in the said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and in part to the said executrix and heirs of *of* Chester Ashley, deceased, and directing certain accounts to be taken of the rents of said lands while used and enjoyed by the complainants in original bill, and decreeing, also, that said complainants in original bill do pay the entire costs of said suit;

And it also appearing that said decree remains unexecuted as to the taking of said accounts, and unsatisfied as to said costs, as well as those accruing on the affirmance thereof in and by the Supreme Court of the United States;

And it also appearing that said defendants to said cross-bills cannot be found:

It is therefore ordered by the court here that all persons interested in the cause and matters aforesaid be, and they are hereby, required to appear before this court on or before the second day of the next
36 term thereof, at a court to be holden at the court-house in the city of Little Rock, on the second Monday in April, A. D. 1867, and show cause, if any they can, why said decree should not be revived, and the lien thereof renewed and continued, and further proceedings had in said cause.

A true copy from the record.
Attest. CHA'S P. REDMOND, *Clerk.*

As marshal of said district I put up the above and foregoing order of said court at the court-house door of said court, in the city of Little Rock, on the 4th day of March, A. D. 1867, where the same remained so posted and advertised for more than four weeks continuously thereafter.

This April 6th, 1867.

ISAAC C. MILLS,
U. S. Marshal for Eastern District Ark's.

Filed April 8th, 1867.

CHA'S P. REDMOND, *Clerk.*

37

38 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered, that at a circuit court of the United States of America, in and for the eastern district of Arkansas, begun and holden on Monday, the 8th day of April, anno Domini one thousand eight hundred and sixty-seven, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry H. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on July 1st, A. D. 1867, it being yet a day of the April term aforesaid, the following further proceedings were had, to wit:

BERNARD HEIRS
vs.
EXECUTORS & HEIRS OF CHESTER ASHLEY, deceased, & Silas Craig.

And now, on this day, come Thomas R. Welch, as administrator de bonis non, with the will annexed, of Chester Ashley, deceased, and Joshua M. Craig, as administrator of Silas Craig, deceased, by their solicitors, Watkins and Rose. And it appearing to the court that two successive writs of scire facias have been duly issued, and re-
39 turned non est, in this cause, and also that a copy of an order, made and entered by this court herein on the first Monday in March, A. D. 1867, setting forth the nature of the case, and requiring all persons interested to appear and show cause why the decree heretofore rendered herein should not be revived, and the lien thereof renewed and continued, and further proceedings had in said cause has been put up at the door of the court-house of this court, continuously for more than four weeks next preceding the April term, A. D. 1867, of this court, at which term the parties were required to appear. And it appearing, also, that on the thirtieth day of April, A. D. 1853, a decree was rendered in this cause by this court, in chancery sitting, vesting and affirming title in and to certain lands therein described in part to and in the executrix and heirs of the said Chester Ashley, deceased, and Silas Craig, and in part to the said executrix and heirs of Chester Ashley, deceased, and directing accounts to be taken of the rents of said lands, while used and enjoyed by the complainants in original bill, and decreeing also that said complainants in original bill do pay the entire costs of that suit, from which decree the said heirs of Bernard sued out and prose-
40 cuted their appeal to the Supreme Court of the United States, where, at the December term thereof, A. D. 1855, the same was in all things affirmed, with costs, and a mandate of such affirmance sent down to this court, all of which more fully and at large appear by the record and proceedings had in this cause, remaining before the court here. And it appearing, also, that upon the affirmance of said decree and return of the mandate consequent thereon, the said heirs of Bernard yielded and gave up to said executrix and heirs of Chester Ashley, deceased, and Silas Craig, and to said executrix and heirs of Chester Ashley, deceased, the possession of the lands so decreed to them, respectively; but that said last-mentioned parties, defendants in original bill, and complainants in said cross-bills, respectively, have not had or obtained any execution or satisfaction of said decree, either as to said accounts of rents and profits so ordered to be taken, or as to the said costs of suit or the costs accruing on said appeal to the Supreme
41 Court.

And it also appearing that since the affirmance of said decree the said Silas Craig hath departed this life, and that administration of and upon his estate hath been, by the probate court of Chicot County, granted to the said Joshua M. Craig; and that likewise, since then the said Mary W. W. Ashley, who was executrix of the will of said Chester Ashley, hath departed this life, and that administration of and upon his estate, unadministered by said executrix, with the will annexed, hath been granted to the said Thomas R. Welch by the probate court of Pulaski County. And the court here, being now well and sufficiently advised of and concerning the premises, and of what decree to render herein, it is therefore ordered and judged and decreed by the court here, that said decree be, and the same is hereby, in all things revived, according to the form, force, and effect thereof, and the lien thereof renewed and continued from and after this date for and during the time prescribed by law in such case; and that as to the taking of said accounts and
42 recovery of any moneys and costs herein, *that* this suit progress by and in the names of the said administrators of the said Chester Ashley and Silas Craig, jointly and severally, according to their respective rights and interests herein; and that Luke E. Barber, esqr., of Little Rock, as master in chancery of this court, be, and he is hereby, ordered to take and state such accounts, upon like directions as those contained in said original decree hereby revived, and report the same to this court at the first rule day in chancery after having completed the same; and that for the purpose of taking such accounts, said master have leave to apply for any further order or directions respecting the same as may become necessary or proper to be made.

And on October 7th, A. D. 1867, before the clerk at rules, the following further proceedings were had, to wit:

BERNARD'S HEIRS
versus
EX'RS & HEIRS OF CHESTER ASHLEY & SILAS Craig. } Bill & cross-bill.

43 On hearing the petition this day filed in this cause by Thomas R. Welch, as administrator de bonis non, with the will annexed, of the estate of Chester Ashley, dec'd, and Joshua M. Craig, as administrator of the estate of Silas Craig, dec'd, and on consideration thereof, the court here being satisfied that all of the pleadings, exhibits, and depositions, and other papers filed in this cause in this court prior to the year of our Lord eighteen hundred and sixty-six, as stated in said petition, have been mislaid, lost, or destroyed, and that on the appeal from the decree pronounced by this court in this cause, made by the heirs-at-law of Thomas Bernard, dec'd, to the Supreme Court of the United States, a complete and duly-authenticated transcript thereof, as used on the hearing and trial of the cause in this court, was made by the clerk and transmitted to and filed in the said Supreme Court, and that the same was printed by the order and direction of said Supreme Court, which is now the best evidence attainable of the contents of the writings and *and* papers in this case filed and used at the trial thereof in
44 this court, now mislaid, lost, or destroyed, doth therefore order that the printed copy, made as aforesaid, of the transcript of the record in this cause, as filed in said Supreme Court and now exhibited to this court, be substituted for and instead of the original writings and papers now lost from the files of the record of this cause in this court,

and have the same force and effect in every respect as would be given to the originals if on file here, and be used by the master in chancery, who shall give to them the like consideration and effect as the originals thereof would have if they were on file here and referred to him. And doth further order that said petitioners file in this court, on or before the first day of the next term thereof, one of the printed copies aforesaid of said record, or a duly-authenticated transcript thereof in writing.

Which petition is in the following words, to wit:

UNITED STATES OF AMERICA,
Eastern District of Arkansas, sct:

45 In the circuit court of the United States in and for the eastern district of Arkansas, in the April term thereof, A. D. 1867.

WILLIAM BERNARD AND OTHERS, HEIRS-AT-law of Thomas Bernard, deceased, by, &c., complainants,
vs.
MARY W. W. ASHLEY, EXECUTRIX, &C., AND Silas Craig, defendants; } In chancery on original bill.

AND

CHESTER ASHLEY AND SILAS CRAIG, COMplainants,
vs.
THE HEIRS OF THOMAS BERNARD, DECEASED, defendants; } On cross-bill.

AND

CHESTER ASHLEY, COMPLAINANT,
vs.
THE HEIRS OF THOMAS BERNARD, DECEASED, defendants. } On cross-bill.

To the honorable the judges of the circuit court of the United States for the eastern district of Arkansas:

Your petitioners, Thomas R. Welch, as administrator de bonis non, with the will annexed, of the estate of Chester Ashley, deceased, and Joshua M. Craig, as administrator of the estate of Silas Craig, deceased, respectfully state and shew to your honors that the said testator, Chester Ashley, and said intestate, Silas Craig, were the defendants
46 named in the said original bill, exhibited in this court by Thomas Bernard, and that said Chester Ashley and Silas Craig were the complainants in said cross-bills exhibited against said Thomas Bernard, complainant in said original bill, or against his heirs-at-law, named as defendant or defendants in said cross-bills. That such proceedings thereupon were had that by the decree of this honorable court upon the premises, the heirs-at-law and legal representatives of said Thomas Bernard, complainant in original bills and defendants in the cross-bills aforesaid, were required to surrender the possession of certain lands, in said original and cross-bills and in said decree respectively mentioned and particularly described, to the legal representatives of said Chester Ashley, a portion, and another specified portion to them and said Silas Craig, and

to pay to them certain rents and profits of the same lands, to be ascertained by the master in chancery of this court, and then by said decree referred to him for said purpose; and by the same decree were required to pay certain costs and charges of suit to the said representatives of Chester Ashley, deceased, and Silas Craig; that from said decree of this honorable court, the heirs-at-law of said Thomas Bernard, he having died pending this suit, and the same having been revived in their
47 names, and prosecuted and defended by them, or in their names, prayed an appeal to the Supreme Court of the United States, which was granted, and the execution of said decree stayed pending their said appeal, which appeal was prosecuted to final judgement on a duly-authenticated transcript of the record of this court, containing a complete exemplification of all the proceedings had before this court on the said original and cross-bills, and the replications and issues thereupon, and of the exhibits and depositions or proofs read or heard on the trial of this cause; and on the hearing thereof in said Supreme Court, and by its adjudication thereupon, the said decree of this court upon the premises was affirmed, and judgement for costs and charges of and upon said appeal pronounced that said appellants do pay the same to said appellees, and the same was remanded and certified to this court with directions to it to execute the decree aforesaid, and enforce payment of costs of said appeal as taxed by said Supreme Court against said appellants. That the said Silas Craig has died since the decree aforesaid was pronounced in this cause, and your petitioner, Joshua M. Craig, has been appointed administrator of his estate, and that
48 said decree has been revived in the names of your petitioners as such administrators as aforesaid, against the heirs-at-law of said Thomas Bernard, deceased, but no execution thereof has ever been had, and the same now stands on a reference to the master in chancery of this court to take and state an account of the rents and profits of the lands directed to be surrendered to the representatives of said Chester Ashley, and to his representatives and Silas Craig, respectively, as particularly described in said decree, while the same were held by said Thomas Bernard, and by his heirs-at-law, after his death, as directed by said decree. And your petitioners state further to your honors that all of the papers in this cause filed in this honorable court at any time previous to the year of Lord eighteen hundred and sixty-six, have been mislaid, lost, or destroyed, and cannot now be produced in court here, but that all such proceedings in this cause as were entered in the books of record made and kept by this court, remain in the court here. That, on the appeal aforesaid, a complete and duly-authenticated transcript of the record of this cause had up to and including the decree aforesaid of this court therein, in which was included all of the pleadings, exhibits, and depositions filed therein, and read upon the
49 hearing and trial thereof, which said transcript was transmitted to and filed in the said Supreme Court, and by direction and authority and for the use of said Supreme Court was printed. And your petitioners now produce to the court here a copy of the record of this suit, printed as aforesaid, and pray the court by some appropriate order to consider the same a valid substitute for so much of the proceedings in this suit as are mislaid, lost, or destroyed, and not to be found on file in this court, and give to it the like force and effect as the said original writings would have and receive if here, and direct the master in chancery, in all his proceedings on the reference to him as aforesaid, to so regard it; and if it shall become, in the view of this court, material to file in the court here a printed copy of said record made as aforesaid,

or a copy thereof, in manuscript, your petitioners will produce and file such copy as a substitute for and in place of the originals lost from the files in this court.

That among the papers lost as aforesaid was an account of the rents and profits of said lands, taken and stated by Richard Searcy, appointed by this court a master in chancery for that purpose, and by him certified to, and returned and filed in this court; and your petitioners pray
50 your honors to authorize and direct the present master in chancery to take and hear proof of the contents of the said account taken, stated, and returned into this court as aforesaid, by said former master, and make report thereof that the said lost account may be reinstated and confirmed, if it shall thereupon appear to your honors right and proper to do so; and for all such further or other relief in the premises as to your honors shall seem just, meet, and proper, and as in duty bound your petitioners will ever pray, &c.

RINGO, WATKINS & ROSE, *Sol.*

Filed October 7th, 1867.

CHA'S P. REDMOND, *Clerk*,
P'r R. S. GOODRICH,
Dep'ty Clerk.

And on the third day of February, A. D. 1868, came into the clerk's office Luke E. Barber, and filed herein his application; which is in the words and figures following, to wit:

In the circuit court of the United States for the eastern district of Arkansas.

51 ELIZABETH J. BERNARD ET AL., INFANT children and sole heirs of Thomas Bernard, dec'd, by William Cannon, their guardian and next friend,
vs.
THOMAS R. WELCH AS AD. D. B. N. OF CHESTER Ashley, dec'd; & W'm E. Ashley, et al., heirs of said Chester, and Joshua M. Craig, ad. of Silas Craig, dec'd.
} On bill & cross-bill.

The master in chancery respect*ively* states that he is informed and believes that the said heirs of Thomas Bernard, dec'd, are non-residents of this State, as is their guardian and next friend, and also their solicitor of record; and he cannot give them, or either of them, personal notice of the time and place of stating the account, as per order of this court. Wherefore he asks further directions.

L. E. BARBER,
M. in C'n.

Filed Feb'y 3d, 1868.

CHA'S P. REDMOND, *Clerk.*

And on the third day of February, A. D. 1868, before the
52 clerk, the following further proceedings were had, to wit:

ELIZABETH J. BARNARD, MARY A. BARNARD, Corrine Barnard, W. S. Barnard, and Thomas Barnard, infant children and sole heirs of Thomas Barnard, deceased, by William Cannon, their guardian and next friend,
vs.
THOMAS R. WELCH, AS ADM. DE BONIS NON OF Chester Ashley, dec'd; and William E. Ashley, et al., heirs of said Chester Ashley; and Joshua M. Craig, adm. of Silas Craig, dec'd.
} On bill & cross-bill.

It is ordered by the court that the master in chancery in this case give the said Elizabeth J. Barnard, and others above specified, who are non-residents of this State, notice of the time and place of stating the account ordered by the court, by publication in some newspaper published in the city of Little Rock, for four weeks.

Attest:

CHA'S P. REDMOND, *Clerk.*

Which notice is in the words and figures following, to wit:

53 In the circuit court of the United States for the eastern district of Arkansas.

ELIZABETH J. BARNARD, MARY A. BARNARD, Corrine Barnard, W. S. Barnard, and Thomas Barnard, infant children and sole heirs of Thomas Barnard, deceased, by William Cannon, their guardian and next friend,
vs.
THOMAS R. WELCH, AS ADM'R DE BONIS NON of Chester Ashley, deceased; and William E. Ashley, et al., heirs of said Chester Ashley; and Joshua M. Craig, adm'r of Silas Craig, deceased.
} On bill and cross-bill.

It is ordered by the court that the master in chancery in this case give the said Elizabeth J. Barnard and others above specified, who are non-residents of this State, notice of the time and place of stating the account, order of the court, by publication in some newspaper published in the city of Little Rock, for four weeks.

Attest:

CHA'S P. REDMOND, *Clerk.*

54 In pursuance of the above order the said non-resident complainants, Elizabeth J. Barnard and others, and their guardian and next friend, are hereby notified that I will proceed to state the account in said cause at the office of the clerk of the supreme court of the State of Arkansas, in the city of Little Rock, on Monday, the 23d day of March next.

L. E. BARBER,
Master in Chancery.

LITTLE ROCK, *Feb'y 15th*, 1868.

STATE OF ARKANSAS, *County of Pulaski,:*

Be it remembered that on this 10th day of March, 1868, personally appeared before the undersigned a duly-commissioned justice of the peace in and for the township of Big Rock, and county aforesaid, W.

D. Blocher, one of the publishers of the Weekly Arkansas Gazette, a newspaper published in the city of Little Rock, who being duly sworn, deposeth and saith that an order of the circuit court of the United States for the eastern district of Arkansas, in the case of—

ELIZABETH J. BARNARD, MARY A. BARNARD, Corrine Barnard, W. S. Barnard, and Thomas Barnard infant children and sole heirs of Thomas Barnard, deceased, by William
55 Cannon, their guardian and next friend,
vs.
THOMAS R. WELCH, AS ADM'R DE BONIS NON, of Chester Ashley, deceased; and William E. Ashley et al., heirs of said Chester Ashley; and Joshua M. Craig, adm'r of Silas Craig, deceased.
} On bill and cross-bill.

(A true copy of which is hereto affixed,) has been published in said paper for 4 successive weeks, the first insertion of which was on the 18th day of February, and the last on the 10th day of March, 1868.

W. D. BLOCHER.

Subscribed and sworn to before me this 10th day March, 1868.

R. W. STEVENSON,
Justice of the Peace.

Filed Ap'r 23d, 1868.

CHA'S P. REDMOND, *Clerk*,
Per R. S. GOODRICH, *D. C.*

56 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 13th day of April, anno Domini one thousand eight hundred and sixty-eight, at the United States court-room in the city of Little Rock, Arkansas, the Honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on April 23, A. D. 1868, it being yet a day of the April term aforesaid, the following further proceedings were had, to wit:

BERNARD'S HEIRS
vs.
EX'RS, &C., HEIRS OF CHESTER ASHLEY, DEC'D, & Silas Craig.
} Bill & cross-bill.

And now comes into court, Luke E. Barber, esqr., master in this cause, and files herein his report of the matters and things referred to him in this cause.

Which report is in the words and figures following, to wit:

57 BERNARD'S HEIRS
vs.
ASHLEY AND CRAIG'S REP'S.
} On bill & cross-bill.

The master in chancery to whom this case was referred, respectfully

presents herewith a report of the rents and profits of the lands in controversy, whilst "possessed and enjoyed" by the complainants, as appears by the proof, by a statement showing the rent of the land decreed to Ashley and Craig, jointly; and also, a statement showing the rent of the land decreed to Ashley alone, with interest in each case, as directed by the decree; personal notice of the time and place of taking the account having been given to the defendants' counsel, and, by publication, to the non-resident complainants, as ordered.

The master specially reports, in relation to the terms of the reference directing him "to ascertain what of 'said lands and premises have been since sold and conveyed' [that is since the governor's conveyance,] by Ashley and Craig" to other persons, and to exclude from his account the value "of the rents and profits of such lands from the time they have 'been so sold and conveyed,'" that *that* both defendants, by answers and cross-bill allege a sale of the lands long anterior to the decree, and before any rent is proved to have accrued, (see printed trans.,
58 pp. 33, 43, 60, 61, 128, 129;) that otherwise no evidence of a sale and conveyance by the defendants to other persons, has been presented to him.

Resp'y submitted.

L. E. BARBER,
Master in Chancery.

Master's fee, $150 00; printers' fee, $20 00—$170 00.

Bernard's heirs in acc't with Ashley's adm., h'rs, & Craig's ad.

To rent of S. W. ¼ sec. 27, T. 18 S., R. 1 W., in 1839, 40 acres, 3$		120 00
" " N. E. ¼ " " " " " " 80 "		240 00
Int. in above sums from 1 Jan., 1840, to 1 Jan'y, 1856, 16 y's	345 60	
Rent of S. W. ¼ as above in 1840, 40 acres, 3$ 120 00		
" N. E. ¼ " " " 160 " " 480 00		600 00
Int. from 1 Jan'y, 1841, to 1 Jan'y, 1856, 15 y'rs	540 00	
Rent of same in 1841		600 00
Int. from 1 Jan'y, 1842, to same time, 14 y'rs	504 00	
Rent of same in 1842		600 00
Int. from 1 Jan'y, '43, to 1 Jan'y, '56, 13 y'rs	468 00	
Rent of same in 1843		600 00
Int. from 1 Jan'y, '44, to same time, 12 y'rs	432 00	
Rent of same in 1844		600 00
Int. from 1 Jan'y, '45, to same time, 11 y'rs	396 00	
Rent of same in 1845		600 00
Int. from 1 Jan'y, '46, to same time, 10 y'rs	360 00	
Rent of same in 1846		600 00
Int. from 1 Jan'y, '47, to same time, 9 y'rs	324 00	
59 Rent of same in 1847		600 00
Int. from 1 Jan'y, '48, to same time, 8 y'rs	288 00	
Rent of same in 1848		600 00
Int. from 1 Jan'y, '49, to same time, 7 y'rs	252 00	
Rent of same in 1849		600 00
Int. from 1 Jan'y '50, to same time, 6 y's	216 00	
Rent of same in 1850		600 00
Int. from 1 Jan'y, 1851, to same time, 5 y'rs	180 00	
Rent of same in 1851		600 00
Int. from 1 Jan'y, 1852, to same time, 4 y'rs	144 00	
To rent of same in 1852		600 00
Int. from 1 Jan'y, 1853, to same time, 3 y'rs	108 00	
Rent of same in 1853		600 00
Int. from 1 Jan'y, 1854, to same time, 2 y'rs	72 00	
Rent of same in 1854		600 00
Int. from 1 Jan'y, 1855, 1 y'r	36 00	
Rent of same in 1855		600 00
	$4,465 60	$9,960 00
Am't of rents to & including 1855		$9,960 00
Int. to Jan'y, 1856	$4,465 60	
Y'r. M. Ds.		
Int. on rents $9,960, from 1 Jan'y, 1856, to 16 Apr. 1868, 12, 3, 15	7,245 50	
		11,711 10
Total am't for rent & int. to 16 Ap'l, 1868		$21,671 10

60 *Bernard's heirs in acc't with Ashley, ad., & h'rs.*

To rent of S. E ¼ sec. 22, T. 18 S., R. 1 W. in 1837, 50 acres, $3		150 00
Int. from 1 Jan'y, 1838, to Jan'y, 1856, 18 y's	162 00	
Rent of same in year 1838, 150 acres *a* $3		450 00
Int. from 1 Jan'y '39, to 1 Jan'y 1856, 17 y's	459 00	
Rent in 1839		450 00
Int. from 1 Jan'y, '40, to same time	432 00	
Rent in 1840		450 00
Int. from 1 Jan'y, '41, "	405 00	
Rent for 1841		450 00
Int. from 1 Jan'y, '42, "	378 00	
Rent in 1842		450 00
Int. from 1 Jan'y, '43, "	351 00	
Rent in '46		450 00
Int. from 1 Jan'y, '44, "	324 00	
Rent in 1844		450 00
Int. from 1 Jan'y, '45, "	297 00	
Rent in 1845		450 00
Int. from 1 Jan'y, '46, "	270 00	
Rent in 1846		450 00
Int. from 1 Jan'y, '47, "	243 00	
Rent in 1847		450 00
Int. from 1 Jan'y, 1848, "	216 00	
Rent in 1848		450 00
Int. from 1 Jan'y, '49, "	189 00	
Rent in 1849		450 00
Int. from 1 Jan'y. 1850, "	162 00	
Rent in 1850		450 00
61 Int. from 1 Jan'y, 1851	135 00	
To rent in 1851		450 00
Int. from 1 Jan'y, 1852, to same time	108 00	
Rent in 1852		450 00
Int. from 1 Jan'y, 1853, "	81 00	
Rent in 1853		450 00
Int. from 1 Jan'y, 1854, "	54 00	
Rent in 1854		450 00
Int. fron 1 Jan'y, '55, "	27 00	
Rent for 1855		450 00
	$4,293 00	$8,250 00
Am't of rents to & including 1855		$8,250 00
Int. to 1 Jan'y, 1856	4,293 00	
Y'r. M. D's.		
Int. in rents $8,250 00, from 1 Jan'y, 56, to 16 Ap'l, '68, 12, 3, 15	6,084 37	
		10,377 37
Total am't f'r rent & int. to 16th Ap'l, 1868		$18,627 37

Filed April 23d, 1868. CHA'S P. REDMOND, *Clerk.*

And on the 25th day of April, A. D. 1868, it being yet a day of the April term aforesaid, the following proceedings were had, to wit:

62 BERNARD'S HEIRS
vs.
EX'RS, &C., HEIRS OF CHESTER ASHLEY, dec'd, and Silas Craig. } Bill & cross-bill.

Come said complainants by Watkins and Rose and Ringo, their solicitors, and moves the court for an order confirming the master's report heretofore filed in this cause.

And, on June 1st, A. D. 1868, before the clerk at rules, the following further proceedings were had, to wit:

ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, & Thomas Bernard, heirs of Thomas Bernard, dec'd, by William Cannon, their next friend, complainants,
vs.
MARY W. W. ASHLEY, WIDOW, EX'RS, & LEGATEE of Chester Ashley, dec'd; William E. Ashley, Francis A. Ashley, & Henry C. Ashley, heirs of said Chester Ashley, dec'd; and Silas Craig, defendants; } On original bill.

AND

63 MARY W. W. ASHLEY, WIDOW, EX'RS, &c., legatee of Chester Ashley, dec'd; William E. Ashley, Frances A. Ashley, & Henry C. Ashley, heirs of said Chester Ashley, dec'd; and Silas Craig, complainants, } On cross-bill.
vs.
ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, dec'd, defendants;

AND

MARY W. W. ASHLEY, WIDOW, EX'T, & LEGATEE of Chester Ashley, dec'd; William E. Ashley, Francis A. Ashley, & Henry C. Ashley, heirs of Chester Ashley, dec'd, complainants, } On cross-bill.
vs.
ELIZABETH J. BERNARD, MARY A. BERNARD, Corrine Bernard, & Thomas Bernard, heirs of Thomas Bernard, dec'd, defendants.

The said defendants to original bill, and complainants in said cross-bills, respectively, by their solicitors, Watkins and Rose and Ringo come respectively and move the court to confirm in all things
64 the several reports of the master in chancery, Luke E. Barber, esq'r, to which this cause was referred, to take and state an account of rents and profits of lands mentioned in the proceedings in this cause, which by the decree therein made are adjudged and ordered to be paid to the legal representatives of Chester Ashley, deceased, and Silas Craig, jointly, and to the legal representatives of said Ashley, separately, by the said heirs-at-law and legal representatives of Thomas Bernard, deceased, mentioned and named in the proceedings in this cause, which said reports were by said master in chancery made to the court here and in open court filed in this cause on the twenty-third day of April last, and no exception having been made and filed to said reports of the master in chancery or to either one of them, by said parties to this cause or any one of them, the court here doth therefore now, in all things confirm the several reports of the master in chancery, Luke E. Barber, made to and filed in this court in this cause as aforesaid on the said twenty-third day of April.

65

66 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

Be it remembered that, at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday the 11th day of April, anno Domini one thousand eight hundred and seventy, at the United States court-room in the city of Little Rock, Arkansas—the Honorable Henry C. Caldwell, district judge, presiding and holding said court—the following proceedings were had, to wit:

And on October 3d, A. D. 1870, it being yet a day of the April term aforesaid, the following further proceedings were had, to wit:

BERNARD'S HEIRS
vs.
ASHLEY & CRAIG, } In chancery on original.

AND

ASHLEY & CRAIG
vs.
BERNARD'S HEIRS, } On cross-bill.

AND

ASHLEY
vs.
BERNARD HEIRS. } On cross-bill.

The court here being now sufficiently advised what order to
67 make upon the premises, this cause having been heretofore submitted on the report of the master, Luke E. Barber, to whom it was referred to take and state an account of the rents and profits of the lands mentioned in the pleadings and proceedings herein, by the decree in this cause adjudged, ordered, and directed to be paid by complainants in said original bill, to said defendants therein. Complainants in the cross-bills aforesaid, and whose report herein was made to, and filed in this court in this cause, on the twenty-third day of April, A. D. 1868, and the court here, being of the opinion that no rents and profits of said lands have accrued as are by the decree aforesaid ordered to be paid by complainants to defendant aforesaid, and that said report of the said master filed herein as aforesaid, should not be confirmed, doth hereby refuse to confirm the same; and doth deny to said defendants to original bill and complainants in cross-bill aforesaid, respectively, their claims for rents and profits as aforesaid, against said complainants in original bill. And the decree aforesaid having been heretofore revived against the said complainants in said original
68 bill, in the names of Thomas R. Welch, as administrator de bonis non, with the will annexed, of said Chester Ashley, deceased, and Joshua M. Craig, as administrator, de bonis non, of the estate of said Silas Craig, deceased, doth award execution thereupon, to issue in their names, as such admistrators as aforesaid, for all costs, in the court here, and in the Supreme Court of the United States, in and about this suit expended, said costs in the said Supreme Court being there taxed, and by said court certified to be one hundred and seventy dollars and fifty cents, and said costs by the decree aforesaid required to be paid by complainants, in the original bill aforesaid, including the costs of revival of said decree and the lien thereof as aforesaid; and doth further adjudge, order, and decree, that said parties go hence without day. Whereupon said defendants in original bill and complainants in said cross-bills, and pray an appeal from the decree herein rendered to the Supreme Court of the United States, and it is ordered by the court that such appeal be, and the same is hereby, granted and allowed.

69 Which bonds for costs are in the words and figures following, to wit:

Know all men by these presents, that we, Daniel Ringo and George C. Watkins, are held and firmly bound unto Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, dec'd, in the sum of two hundred and fifty dollars, to be paid unto the said obligees, their executors, administrators, or

assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Whereas in a certain suit in chancery, lately pending and determined in the circuit court of the United States in and for the eastern district of Arkansas, wherein the said above-named Elizabeth J. Bernard, Mary A. Bernard, Corrine Bernard, and Thomas Bernard, heirs of Thomas Bernard, dec'd, by William Cannon, their next friend, were complainants in original bill, and Chester Ashley and Silas Craig were defendants, and the representatives of said Ashley, viz, Mary W. W. Ashley, widow, executrix and legatee, and William E. Ashley, Francis A. Ashley, and Henry C. Ashley, heirs of said Chester Ashley, deceased, and Silas Craig were complainants in cross-bill; and said heirs of Thomas Bernard, dec'd, were defendants on cross-bill, also on
70 cross-bill of said Silas Craig, who has since died; and which suit was revived in said court, in the name of Thomas R. Welch, as administrator de bonis non of said Chester Ashley, dec'd, and Joshua M. Craig, as administrator of said Silas Craig, deceased, and in their names as defendants, on original bill, and complainants on cross-bills aforesaid, and by them defended and prosecuted, the said Thomas R. Welch, as adm'r as aforesaid, and Joshua M. Craig, as administrator as aforesaid, parties to said suit as above stated, have prayed an appeal to the Supreme Court of the United States, from the final decree and judgement made by said circuit court in the cause aforesaid:

Now, therefore, the condition of this obligation is such, that if the above-named appellants, Thomas R. Welch, as administrator de bonis non of the estate of Chester Ashley, dec'd, and Joshua M. Craig, as administrator of the estate of Silas Craig, dec'd, shall prosecute their appeal aforesaid with effect, and pay all such costs and expenses as shall be awarded against them as such appellants therein, then this obligation to be void; otherwise to remain in full force and effect.

Signed and sealed by us this 25th day of November, 1870.

DANIEL RINGO. [SEAL.]
GEO. C. WATKINS. [SEAL.]

Filed Nov. 25th, 1870.

FRANK E. WRIGHT, *Clerk.*

71 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Frank E. Wright, clerk of the circuit court of the United States for the eastern district of Arkansas, in the eighth circuit, hereby certify that the foregoing writings, composing seventy pages, annexed to this certificate are true, correct, and compared copies of their originals on file and remaining of record in my office, in the case of Bernard Heirs vs. Chester Ashley et al., on the chancery side of said court, & comprising a complete transcript of the record from the date of the filing of the mandate from the Supreme Court in this cause.

In witness whereof I have hereunto set my hand and the seal of said court this 25 day of November, in the year of our Lord one thousand eight hundred and seventy and of the independence of the United States of America the ninety-fifth.

Attest: [SEAL.] FRANK E. WRIGHT, *Clerk.*

(Indorsement on cover:) No. 341. Thomas R. Welch, adm'r of Chester Ashley, dec'd, and Joshua M. Craig, as adm'r of Silas Craig, dec'd, appellants, vs. Elizabeth J. Barnard et al., heirs of Thomas Barnard, dec'd. E. Arkansas C. C. U. S. Filed 6th December, 1870.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

NO. 341.

THOMAS R. WELCH, Administrator of Chester Ashley, deceased, and
JOSHUA M. CRAIG, Administrator of Silas Craig, deceased, Appellants.

vs.

ELIZABETH J. BERNARD, *et als.*, heirs of Thomas Bernard, deceased, Appellees.

Appeal from the Circuit Court of the United States, for the Eastern District of Arkansas.

Thomas Bernard, a citizen of the State of Mississippi, the father of the present appellees, on the 15th of May, 1837, filed his original bill in this cause, against Chester Ashley, Silas Craig, *et als.*, citizens of the State of Arkansas, for the purpose of quieting his title to certain lands in Arkansas, which he claimed as owner and occupant. (*Pr. Rec.*, *p.* 7, 8.)

The answer of Silas Craig, to said bill was filed December 17th, 1838; and that of Chester Ashley, February 16th, 1839. (*Pr. Rec., p.* 25, 34, 46.)

The Replication of complainant, Thomas Bernard, to said answers, was filed October 16th, 1840. (*Pr. Rec., p.* 47.)

Said complainant, Thomas Bernard, died on some day between the April term, 1844, and the April term, 1845, of said circuit court; whereupon, his children and sole heirs, all then minors, residing in the State of Mississippi, by William Cannon their next friend, also a citizen of the State of Mississippi, to-wit: Elizabeth J. Bernard, Mary A. Bernard, Corinne Bernard, William S. Bernard and Thomas Bernard, filed in said circuit court, their bill of Revivor, to revive said suit, and prosecute the same in their names as complainants to final judgment. (*Pr. Rec., p.* 50, 51.)

The agreement of said complainants, heirs of Thomas Bernard, complainant in original bill, that said defendants have leave to file cross bills in this case, was filed June 22d, 1847. (*Pr. Rec., p.* 54.)

Defendant, Chester Ashley, filed his cross bill against said complainants, sole heirs of said Thomas Bernard, December 6th, 1847, and defendants, Chester Ashley and Silas Craig, jointly, filed their cross bill against the same parties, December 29th, 1847. (*Pr. Rec., p.* 55.)

April 28th, 1848, the court, with his consent, expressed in open court, appointed said William Cannon, guardian *ad litem* of said heirs of Thomas Bernard, deceased, to prosecute this suit in their names and behalf, and by rule required him to enter as such guardian, their appearance in this suit; and on the 8th day of May, 1848, said Cannon, with his assent, was also appointed by said court guardian *ad litem* of said heirs, for the defense of said cross bills, whereupon they, the said Elizabeth J. Bernard, Mary A. Bernard, Corrinne Bernard, William S. Bernard and Thomas Bernard, by William Cannon, their said guardian *ad litem*, appeared and filed their joint answer to said cross bills, to which replications were filed, whereupon the case was set down for final hearing. (*Pr. Rec., p.* 57, 58.)

On the 18th day of June, 1848, said heirs of said Thomas Bernard, by said Cannon, their next friend, filed in this suit, their supplemental bill and bill of revivor, against the widow, executrix, and heirs of defendant, Chester Ashley, who had died in May, 1848, and November 6th, 1848, said widow, executrix, and heirs of said Ashley, filed their bill of revivor against the said heirs of Thomas Bernard. (*Pr. Rec., p.* 82, 83.)

And December 4th, 1848, by consent of all the parties to this suit, the same was revived as prayed in and by said several bills of revivor, and ordered to progress in the names of said heirs of Bernard, and said representatives of Ashley, respectively. (*Pr. Rec., p.* 88, 89.)

And April 23d, 1853, on the pleadings, and between the parties aforesaid, the case came on to be heard, and was argued by counsel, and April 26th, 1853, submitted to the court, and a final decree thereupon pronounced by the court April 30th, 1853; from which said heirs of Bernard, appealed to this court, and thereby brought the case here. (*Pr. Rec., p.* 92, 93, 95.)

This court, on said appeal, adjudicated the case between said parties, and at its December term, 1855, on the 8th day of January, 1856, affirmed in all things with costs, the decree made therein by the circuit court, and remanded the case to the circuit court " for further proceedings to be had therein, as regards the profits and improvements," and by its mandate to the judges of the court, commanded that such execution and proceedings therein be had, as according to right and justice, and the laws of the United States, ought to be, the said appeal notwithstanding. (*New Pr. Rec., p.* 1, 2, 3.)

Said mandate was filed in this cause in the circuit court, February 1st, 1858, and by order of the court, copied into the record of its proceedings in this cause, April 28th, 1858, the case reinstated on its docket, and by consent of all parties, referred to its clerk, Richard Searcy, as special master in chancery, to take and state an account of the rents, profits and improvements, of the lands, as directed by said decree of April

30th, 1853, made and entered of record in this case. (*New Pr. Rec., p.* 3, 4.)

And October 26th, 1859, said Searcy, as such master, filed in open court his report of said rents, profits and improvements, as directed by said decree to be paid by said heirs of Bernard. (*New Pr. Rec., p.* 5.)

This report by Searcy, as special master, having been lost or mislaid by time, accident, or casualty, the present appellant, Thomas R. Welch, as Administrator of Chester Ashley, and Joshua M. Craig, as Administrator of Silas Craig, defendants to said original bill, and complainants in said cross-bills, November 5, 1866, at Rules, filed in this cause in said Circuit Court, their joint, and several petition, or bill of Revivor, for the revivor of said suit in their names, the revivor of the lien of said decree, against the said heirs of Thos. Bernard, and their next friend and guardian, *ad litem*, William Cannon, and for a writ of *sci. fa.* against them commanding them to show cause, etc., which was ordered to issue, and issued, and was returned, November 23d, 1866, not found, and *non est inventus.* (*New Pr. Rec., pp.* 5, 6, 9.)

An *alias sci. fa.* was issued March 4th, 1867, which, April 5th, 1867, was also returned *non est inventus*, and filed. (*New Pr. Rec., p.* 9, 10, 12.

Whereupon, July 1st, 1867, the court adjudged that this suit be revived and prosecuted in the names of said Thos. R. Welch, and Joshua M. Craig, as such administrators; and that said decree of April 30, 1853, and the liens thereof be in all things revived, according to the form, force, and effect thereof; and that this suit as to the account to be taken of rents and profits of said lands, proceed in the names of said Welch and Craig, administrators, severally, or jointly, according to their respective rights and interests therein, and appointed Luke E. Barber master in chancery, to take and state said accounts, upon like directions as those contained in said decree of April 30, 1853, and report the same to the court. (*New Pr. Rec., p.* 13, 14.)

On their petition then filed in this cause by said administrators, Welch and Craig, representing and showing that certain original pleadings, and papers, filed in this case, in said Circuit Court, were mislaid, lost, or destroyed, a duly certified copy whereof the printed record contained, from the written transcript thereof, filed in this court by said heirs of Bernard, on their appeal aforesaid. The court, October 7, 1867, ordered that such printed copy thereof be substituted for, and instead, of the said writings and papers lost or destroyed, and used by the parties to this suit, with the like force and effect as would be given to said originals if here on file; and directed said master in chancery to use and so consider the same. (*New Pr. Rec.*, *p.* 14.)

Said master, on February 3, 1868, filed his petition stating that said heirs of Bernard, and William Cannon, their next friend and guardian *ad litem*, and their solicitor in this case, are all non-residents of this State; and asking of the court further directions; whereupon the court ordered, that he give them notice of the time and place of taking the accounts aforesaid, by publication thereof for four weeks in some newspaper published in the city of Little Rock, which he did accordingly. (*New Pr. Rec.*, *p.* 17, 18.)

He also gave personal notice thereof to their counsel, as stated in his report to the court. (*New Pr. Rec.*, *p.* 20.)

And April 23, 1868, the said master, Luke E. Barber, appeared in court and filed his report in this cause, showing the value of said rents and profits, adjudged to be paid by said heirs of Bernard by said decree of April 30, 1853. (*New Pr. Rec.*, *p.* 19, 20, 21.)

Complainants Welch and Craig, on the 25th of April, 1868, filed their motion in writing for the confirmation, by the court, of the master's report, filed April 23, 1868. (*New Pr. Rec.*, *p.* 21.)

And on June 1st, 1868, at rules, on motion of Complainants Welch and Craig, administrators, the said master's report filed in this case, April 23d, 1868, to which no exception was filed,

although one month and more from the date of filing same had elapsed, an order and decree confirming the same was entered by the clerk in this cause, pursuant to the 83d rule prescribed by this court for the government of the Circuit Courts, in proceedings in equity. (*New Pr. Rec., p.* 22)

On the 3d day of October, 1870, the court pronounced its opinion that no rents and profits of said lands have accrued, as are by the decree aforesaid ordered to be paid by complainants to defendants aforesaid, and that said report of the master should not be confirmed, and entered an order and decree refusing to confirm the same; and denying to said defendants to original bill and complainants in cross bill aforesaid, respectively, their claims for rents and profits against said complainants in original bill; but awarding to complainants Welch and Craig, as administrators, execution for costs; and that said parties go hence without day. From this decree Welch and Craig prayed an appeal to this court, which was granted and allowed. (*New Pr. Rec., p.* 23, 24.)

Welch and Craig, by said appeal, have brought the case before this court, and insist that, from the facts shown by the record, the jurisdiction of the court over the heirs of Bernard, the original complainant, by whom, through and by their next friend and guardian *ad litem*, the suit was revived and prosecuted on said bill, and defended on said cross bills, is unquestionable, for, on the death of their ancestor, Thomas Bernard, they voluntarily, by their next friend, William Cannon, whom the Circuit Court, with his consent, appointed their guardian *ad litem*, appeared, and, in 1845, caused this suit to be revived in their names, and, afterwards, in 1847, by their agreement of record, consented to the filing of cross bills against them by defendants, Ashley, and Ashley and Craig, which were filed accordingly; and the joint answer thereto of said heirs, then filed by their said next friend and guardian *ad litem*. And, in 1853, they also, by their said next friend and guardian, made and prosecuted their appeal to this court, from said decree of April 30, 1853, and thus being parties in court, legally and rightfully,

as to the proceedings on said cross bills, as well as on said original bill, they so remained, and were, and are bound by every proceeding, order and decree of the courts in the case, affecting their rights, prior to their dismissal from the cause and court, by said order and decree of the Circuit Court, made October 3d, 1870, from which the present appeal to this court is prosecuted by said Welch and Craig, as the administrators and legal representatives of Chester Ashley and Silas Craig, the defendants to the original bill, and complainants respectively, in said cross bills, in whose favor the said decree of April 30, 1853, was made.

By the decree of April 30, 1853 aforesaid, brought before this court on the appeal of said heirs of Bernard, and affirmed in all things by this court, at its December term, 1855 (on January 8, 1856), among other things it was decreed: "That said complainants in said original bill do pay to said Craig and said executrix and heirs of Chester Ashley, the value of the rents and profits of said land and premises, or of so much thereof as shall have been possessed, used and enjoyed by said Thomas Bernard, or his heirs, at any time since the conveyance thereof by the Governor of said Territory to said Craig and Ashley, or to said Craig for their joint benefit, and not by them sold and conveyed to other persons; and in such case, only until the time of such sale and conveyance." And it is the enforcement and execution of this decree, and this only, that is sought by the present appellants, Welch and Craig, as administrators respectively of said Ashley and Craig; and this it is that the court has refused to give, and wholly denied to them, by its said order and decree of October 3, 1870; (*New Pr. Rec*, *p.* 23); the result, as we think, of a very grave misconception of the facts of the case as shown by the record; and also of the scope and force of said decree of April 30, 1853, and of the mandate of this court, commanding the enforcement and execution thereof by the Circuit Court. Also the effect of the 83d of the rules prescribed by the court for the regula-

tion of proceedings in the Circuit Court, in suits in equity pending therein, and the government of said courts in their action thereupon, by the force of which said rule, the master's report filed in this case, April 23d, 1868, to which no exception was filed within one month from the day of filing the same, stood confirmed on the next rule day thereof (the first Monday in each month being a rule day in said court); and in strict conformity thereto, the clerk of said court, at rules, on the 1st day of June, 1868, entered in this case a proper order and decree confirming the same (that being the first rule day after the end of one month from the day it was filed—*New Pr. Rec., p.* 21, 22), which has never been set aside, unless such be the legal effect of said decree of October 3, 1870. For a period exceeding two years from the day on which the master filed his report, as also from the day when the clerk, at rules, entered the order confirming the same, the matter rested, and no exception to said report was ever filed in the case, nor was any application to the court ever made asking it to revoke or set aside said order entered at rules confirming it, although one term or more of the court intervened, and was holden and ended before the court made said decree of October 3, 1870; wherefore, appellants insist that so much of said decree as refuses to confirm, and as rejects said report of the master, was made inadvertently, or improvidently, if not wholly without authority.

The south fractional half, and northeast quarter of section 27, in township 18 south, range 1 west, embraced in said decree, was conveyed by the Governor of the Territory of Arkansas (John Pope) to Silas Craig, June 6, 1834 (*Pr. Rec., p.* 99, 100), and these lands were then occupied and used by Thomas Bernard, the complainant in said original bill, who held the same in possession until he died, in 1844, and the same was thenceforward continuously held by his said heirs, the now appellees here, until sometime in the year 1856. *Pr. Rec., p.* 3, 5, 7, 8, 107, 108, 109.

And thus Bernard and his said heirs (all being parties to this

suit) used and cultivated a great part of said south half, and northeast quarter, of section 27, township 18 south, range 1 west, wrongfully for about twenty-two years, that is, Thomas Bernard ten, and his said heirs twelve years, and respectively had and enjoyed the rents and profits thereof, proven to be of the annual value of three dollars per acre.

The decree of April 30, 1853 requires expressly the said heirs of Bernard to surrender and yield up these lands to Craig and the executrix and heirs of Ashley, and to pay to them the value of the rents and profits thereof. In obedience to this requirement they, sometime in the year 1856, did so surrender and yield the possession of said lands, but wholly failed to pay, and never have paid to them, or to any one, the value of the use, rents and profits thereof, as said decree requires, or in any manner, but continue to hold and enjoy the same wrongfully and against the form and effect of said decree. And now, when appealed to by the administrators respectively, of said Craig and Ashley, to cause this important part of said decree to be enforced against the said heirs of Bernard, who, as stated above, with their father, wrongfully held said lands for the period of about twenty-two years, and for that period of time appropriated to their use the whole value of the use, rents and profits thereof, which the proof in the cause, when said decree was made, and still in it, shows to have been not less than $3 per acre per annum; and this the master allows as comprehended by the decree, and established by the proofs before him. The Circuit Court, notwithstanding said decree, and the mandate of this court commanding the judges thereof to enforce its execution, apparently from some misconception of the attitude in the cause and in the court, of the said heirs of Bernard, or misunderstanding of the facts of the case or proof in the cause, or misapprehending the scope and force of said decree of April 30, 1853, or of said mandate of this court, and of the said 83d rule provided by this court for the regulation and government of its practice in such case, or wholly disregarding them. By its action and judgment of October 3, 1870, has, in the

face of the distinct, direct, express and imperative award of said decree, of the value of the use, rents and profits of said lands to Ashley and Craig, and the command thereby given, that said heirs of Bernard pay the same to them, without any new or additional facts being presented to change, in the least, the rights of Ashley and Craig in the premises, or the obligagation and duty of Bernard's heirs, held and decided expressly and explicitly to the contrary thereof—that is to say, that no rents and profits of said lands have accrued, which Craig and Ashley, or either of them, are entitled to have under said decree; and that their respective claims thereto be denied, and thereupon refuses to confirm said report of the master, and decrees its rejection, notwithstanding it stood in the record of the cause confirmed by authority of said 83d rule on the 1st day of June, 1868, more than two years before; and as several terms of the court intervened between such confirmation and rejection, we submit that in the circumstances as shown by the record, the court had no rightful authority to order or decree its rejection on the said 3d day of October, 1870, but that it ought to be held as confirmed, and be enforced against the heirs of Bernard, said decree of October 3, 1870 to the contrary notwithstanding.

The report of the master shows notice given to the heirs of Bernard, and Cannon, their next friend, by publication as derected by the court, and in addition, personal notice to their counselor or attorney in this case; whereupon he proceeded to take and state the accounts as directed by said decree of April 30, 1853, observing every requirement, also, of the rules in such case prescribed by this court, stating separately the value of the rents and profits of the lands jointly owned by Craig and Ashley, and those owned by Ashley alone, with all needful particulars; and the same, as the record shows, was reported by him to the court and filed in open court April 23, 1868 (*Pr. Rec., p.* 19, 20, 21); and that Welch and Craig, as administrators respectively of Silas Craig and Chester Ashley, on the 25th of same month, filed in court their motion for the confirmation of said report. *New Pr. Rec., p.* 21.

The facts of the case, as to rents and profits, decreed for use of the southeast quarter of section 22, township 18 south, range 1 west, are substantially the same as those relating to lands in section 27 of same township and range, referred to above. *New Pr. Rec., p.* 126. And the proofs establishing the value thereof apply with equal force. *See depositions of Romulus Payne, James Clark, James S. Peak, and others, Pr. Rec., p.* 107, 108, 109.

Ashley and Craig, in their answers to the original bill, state a sale by them of said lands before this suit was brought, but nowhere state, or in any manner show the same, or any part thereof *conveyed* by them, or either one of them, to any person; nor is the same shown on the part of Bernard's heirs, whose interest alone it would be to establish the same, if such was the fact, as thereby they might relieve themselves, under said decree, from the payment after the date of said conveyance, of the rents and profits thereof to the said Craig and Ashley, or their heirs or administrators; and assuredly they would have done this if these lands were conveyed in any manner so as to divest their title thereto; but knowing the fact to be otherwise, they have never attempted to show any conveyance thereof. While, by their cross bills, exhibited and filed in this cause in 1847, a long time subsequent to their respective statements about the sale thereof made by them, in their answer to said original bill, Craig and Ashley severally claim of Bernard, and of his heirs, the rents and profits of his and their use of said lands, and no vendee of theirs has appeared and asserted any right or claim to the same; and being bound for the payment of said rents and profits, we do not perceive how they can be damaged by paying the same into court in this cause, or to said representatives of Craig and Ashley, in obedience to the order and direction of the court, given in and by said decree of April 30, 1853, when, if the lands have been sold as they represent in their answers, they would take and hold the money in trust for the use of their respective vendees, who, if entitled to it, could assert their rights respectively and recover it from them,

or procure an order or decree directing its payment over to them. But its disposal is a matter with which the heirs of Bernard, according to our view of the subject, have no concern, as their payment, in pursuance of said decree, would surely be a complete protection to them against all claimants not having the legal title to said lands prior to the date of their surrender in 1856.

The following propositions are submitted:

1. The status of Bernard's heirs, as parties to this suit, and upon this record, is irrevocably fixed by the adjudication of this court, affirming the decree of the court below, and remanding the cause, with specific directions, for further proceedings.

2. There must have been some period of time, while these lands were in the possession of Bernard, after Craig and Ashley acquired titles to them, and before they sold them, that Bernard or his representatives would be liable to account to Craig and Ashley, or their representatives, for use and occupation, under the original decree, as affirmed by this court. But any such inquiry or relief is denied by the decree of 1870, here appealed from.

3. The decree here appealed from, nullifies the original decree which this court affirmed and directed to be carried into execution. The master was directed to take an account of the rents and profits, and at the same time to inquire and ascertain what lands had been sold *and* conveyed by Craig and Aashly, and to exclude from the account the rents and profits of any such lands accruing after the date of such *sale and conveyances.*

A portion of these lands had been sold and conveyed by Craig and Ashley to James S. and Madison Peake. An examination of the master's report will show that no account is taken of the rents and profits of these lands.

Other portions of the land in controversy were sold by Craig and Ashley to Isham Talbot, and also to Henry C. Payne. In regard to these lands there is no evidence of any conveyances by Craig and Ashley, but the contrary. For example: In the case of the sale to Henry C. Payne, if the court will look into

the printed record on the former appeal, *p.* 128, *et seq.*, the character of the sale will appear. It was only a conditional contract of sale, showing that Ashley had not then obtained title from the patentee, and an obligation or undertaking on his part to procure such title, and *then* to make a deed to Payne; showing also that the lands were adversely held, and an agreement on the part of Ashley, that as soon as Payne should become invested with the title, he (Ashley) would bring a suit for him to recover the lands; and finally providing that in case of failure on the part of Ashley to comply with the contract on his part, he was to refund to Payne the money paid, with interest, etc. These lands, in point of fact, *ib.*, *p.* 129, were not conveyed to Ashley by the patentee (Nooner) until in 1847, eleven years after the contract of sale from Ashley to Payne. This litigation has been pending ever since, and there is no evidence of any conveyance having been made by Ashley pursuant to his contract with Payne.

These facts, which the Circuit Court must have understood in rendering the original decree, will explain the carefully guarded lnnguage of that decree, in excluding from the account the rents and profits of those lands only which he should ascertain upon inquiry to have been sold *and* conveyed by Craig and Ashley, or either of them.

4. It may be objected that the present appellants have not shown that descendable assetts came to the hands of the appellees from their ancestor, Thomas Bernard.

In an original suit, whether at law or in equity, brought against heirs, to enforce a claim arising out of contract with the ancestor, dormant during his life, but springing into existence after his death, (as, for example, a covenant of warranty broken by eviction) it might, and doubtless would, be required of the plaintiff to show that descendable assets had come to the heir, and the extent of his recovery would be limited by their amount or value. But that principle can have no application to a case like the present, where the original suit was com-

Supreme Court of the United States.

DECEMBER TERM, 1871.

No. 141.

THOMAS R. WELCH, Administrator of CHESTER ASHLEY, deceased, and JOSHUA M. CRAIG, Administrator of SILAS CRAIG, deceased, *appellants*,

vs.

ELIZABETH J. BRANARD, *et al*, heirs of THOMAS BERNARD, deceased, *appellees*.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

BRIEF FOR APPELLEES.

The circuit court for the eastern district of Arkansas, in deciding this case, found the title to the lands in question to be in Silas Craig and the heirs and executors of Chester Ashley, (see Rec. p. 1,) and directed Luke E. Barbour, the master in chancery, to take and state an account of the profits, with interest, &c., on the land and premises used and cultivated by Barnard and his said heirs, after the conveyance thereof from the Governor, until the taking of said account, and to ascertain what of said lands and premises had been

sold to other persons, and to exclude from such account the value of the rents and profits of any such lands from the time they were sold. (Record, p. 2.)

This decree was affirmed by this honorable Court, (see 18 How., pp. 43 to 50,) and the case was remanded for further proceedings to be had respecting the profits and improvements. (Record, pp. 1, 2 and 3.)

Upon the filing of the mandate of this court, February 1st, 1858, the circuit court aforesaid appointed Richard Learey to examine said case and state an account of the rents, profits, and improvements of the said lands according to the decree of said court. Afterwards, May 3d, 1857, the death of Silas Craig and Junius W. Craig was suggested of record, and William P. Halliday was permitted to come in and prosecute, &c. (Rec., 4.) It appears also from the record that the master in chancery made his report, (page 5 of record,) and here the proceedings rested until the 5th day of November, 1866, when a motion was made to revive the case against the complainants in the original and the defendants in the cross-bill, (record, p. 6,) which motion was granted, and *scire facias* was ordered. (Record, pp. 7 and 8.) And afterwards, on the 23d day of November, 1866, the marshal returned said *scire facias* with the endorsement that the defendants were not within his district. Afterwards, on the 4th day of March, 1867, on motion, a further *scire facias* was issued requiring the defendants to come in and show cause, &c. (Record, pp. 10 and 11.) And afterwards, on the 8th day of April, 1867, the marshal returned this second writ with the following endorsement: "I hereby certify that after diligent inquiry I have been unable to find the within-named parties, or any or either of them, in my bailiwick." (Record, p. 11.) On the 6th day of April, 1867, the marshal certified that he posted the order of the court in said case on the court-house door for more than four weeks. (Record, p. 12.) Afterwards, on the 1st day of July, 1867, the said circuit court made an order reviving said cause against the absent heirs

of Bernard, and appointed Luke E. Barbour, master in chancery, to take an account of the rents, profits, &c., as ordered in the original decree, and to notify all parties to said cause. On the 3d day of February, 1868, the master in chancery reported that the heirs of Bernard were non-residents, and that he could not give them notice, &c. (Record, p. 17.) On said day the court ordered the said master in chancery to give the absent defendants notice by publication in some newspaper for four weeks, (record, p. 18,) which was done; and afterwards the said Barbour made his report of the rents and profits of the lands in question "whilst possessed and enjoyed" by the complainants, and specially reported that both defendants by answer and cross-bill allege a sale of the lands long anterior to the decree, and before any rent is proved to have accrued, and that no other evidence of sale had been presented. (Record, p. 20.)

This report, which found large amounts of rent to be due, was prematurely confirmed by the clerk, June 1, 1868. (Record, p. 21.) Afterwards, on the 3d October, 1870, it being a day of the same term of said court, the honorable circuit court, "being of the opinion that no rents and profits of said lands have accrued as are by the decree aforesaid ordered to be paid by complainants to defendant aforesaid," refused to confirm the said report of the master in chancery, and denied the parties their claim for rents and profits. (Record, p. 23.)

From this decree the appellants appealed to this honorable court; and we submit:

1st. That the report of the master in chancery, showed that no rents accrued to Ashley during the possession of the lands by Bernard, but that all rents and profits accrued after the lands had been sold, and that the circuit court was right in refusing to confirm the master's report.

2d. The mere supposition, as stated in the second point of appellant's brief, that there must have been some time during

the occupancy of Bernard in which rents accrued, and for which his heirs are liable, is found against them by the court, and there is nothing in the record to justify the interference of this honorable court.

3d. Under any circumstances, the decree of the court below was correct, and should be affirmed, as there could be no decree against Bernard's heirs, personally, for rents that accrued against their father. It is not shown that they received any assets from their father.

All of which is respectfully submitted.

GEO. TAYLOR,
Solicitor for Appellants.